Mars Equity Sdn Bhd v Tis 'Ata'ashar Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W–02–48 OF 1998
GOPAL SRI RAM, MOHD GHAZALI AND ARIFIN JAKA JJCA
13 DECEMBER 2004

Contract — Breach — Contract to transfer immovable property — Presumption of pecuniary irremediableness — Appropriateness of specific performance as remedy — Specific Relief Act 1950 s 11(2)

Contract — Construction — Contemporaneous agreements forming one transaction — Whether all such agreements should be read together as if one

Contract — Formation — Reciprocal promises — Performance of — Order of performance not fixed in agreements — Whether 'nature of transaction' could be looked at to determine order of performance of each party's obligations

The parties entered into two contemporaneous agreements. One was for the transfer of land from the respondent to the appellant ('the sale of land agreement'). The other was an agreement to fell and extract timber ('the timber agreement'). The respondent did not transfer the land under the sale of land agreement. The appellant on the other hand did not apply for a timber licence as required under the timber agreement. At first instance, the appellant sought specific performance to compel the respondent to, inter alia, transfer the land. The High Court however dismissed the appellant's claim. On appeal to the Court of Appeal, the appellant contended that: (i) both agreements should be read together; (ii) it had performed its obligations under the sale of land agreement and was thus entitled to call upon the respondent to effect a transfer in its favour. The respondent however contended that it was for the appellant to apply for the licence under the timber agreement in the first place. Since the appellant did not do that, there was nothing for the respondent to perform. The issue before the Court of Appeal was thus the sequence in which the promises of the parties were to be performed.

Held, allowing the appellant's appeal with costs:

(1) Where several documents forming part of one transaction are executed contemporaneously, all the documents must be read together as if they are one (see para 2); *Manks v Whiteley* [1912] 1 Ch 735 (refd); *Idris bin Haji Mohamed v Ng Ah Siew* [1935] MLJ 257 referred.

(2) In the instant case, the two agreements when read together did not expressly fix the order of performance of the parties' respective obligations.

Thus, the nature of the transaction had to be looked at to determine this. Taking the two agreements together and reading them as a whole and in the context 'the objective aim of the transaction', it was clear that the appellant could not possibly apply to the appropriate authority for the licence until it became the registered proprietor of the land in question. A non-registered proprietor has no standing to apply for the kind of licence contemplated by the timber agreement. In a purely commercial transaction such as the instant one, the correct approach is to interpret the agreements in a way that is consonant with business common sense (see para 8); *Prenn v Simmonds* [1971] 3 All ER 237 referred; *Antaios Compania Naviera SA v Salen Rederierna AB* [1985] AC 191 followed.

(3) The High Court erred in treating the two agreements as separate contracts and in dealing only with the appellant's obligations under the timber agreement without having any regard to the sale of land agreement. The High Court failed to have any sufficient regard to the order in which the parties were to perform their respective obligations. There was therefore merit in the complaints directed at the High Court's judgment by counsel for the appellant (see para 9).

(4) In the instant case, the respondent was clearly in breach of its primary obligation to transfer the land to the appellant. Therefore, it was not in a position to call for the performance of the appellant's obligation under the timber agreement to apply for the licence. The present case was well within s 55 of the Contracts Act 1950 (see para 10).

(5) A breach of a contract relating to land is rebuttably presumed to be irremediable by monetary compensation. In the instant case, there was no evidence to rebutt such presumption as contained in s 11(2) of the Contracts Act 1950. Hence, specific performance was the appropriate remedy (see para 11).

Per curiam:

If a detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business common sense, it must be made to yield to business common sense (see para 8).

[Bahasa Malaysia summary

Pihak-pihak telah menyempurnakan dua perjanjian. Satu adalah untuk pemindahan tanah daripada responden kepada perayu ('perjanjian tanah tersebut'). Satu lagi adalah perjanjian untuk menumbang dan mengambil kayu balak ('perjanjian kayu balak'). Responden tidak memindahkan tanah tersebut di bawah perjanjian jualbeli. Perayu sebaliknya tidak memohon untuk satu lesen kayu balak seperti yang dihendaki di bawah perjanjian kayu balak itu. Pada mulanya, perayu memohon pelaksanaan spesifik untuk mendesak responden, antara lain, memindahkan tanah itu. Mahkamah Tinggi bagaimanapun telah menolak tuntutan perayu. Dalam rayuan ke Mahkamah Rayuan, perayu menegaskan bahawa: (i) kedua-dua perjanjian tersebut hendaklah dibaca bersama; (ii) ia telah melaksanakan tanggungjawabnya di bawah perjanjian jualbeli itu dan oleh demikian berhak untuk meminta responden melaksanakan pemindahan tersebut menyebelahinya. Responden bagaimanapun

menegaskan bahawa perayu hendaklah memohon untuk lesen di bawah perjanjian kayu balak terlebih dahulu. Memandangkan perayu tidak berbuat demikian, tiada apa-apa untuk dilaksanakan oleh responden. Persoalan di hadapan Mahkamah Rayuan adalah berturutan di mana perjanjian pihak-pihak akan dilaksanakan.

Diputuskan, membenarkan rayuan perayu dengan kos:

(1) Di mana beberapa dokumen membentuk sebahagian daripada satu transaksi disempurnakan sekali, semua dokumen itu hendaklah dibaca bersama seperti ianya satu (lihat perenggan 2); *Manks v Whiteley* [1912] 1 Ch 735 (refd); *Idris bin Haji Mohamed v Ng Ah Siew* [1935] MLJ 257 dirujuk.

(2) Dalam kes semasa, dua perjanjian tersebut apabila dibaca bersama tidak dengan nyata menetapkan perintah pelaksanaan tanggungjawab pihak-pihak masing-masingnya. Oleh itu, sifat transaksi itu perlu diteliti untuk menentukannya. Dengan meneliti kedua-dua perjanjian tersebut dan membacanya secara keseluruhan dan dalam konteks 'the objective aim of the transaction', adalah jelas bahawa perayu tidak mungkin memohon kepada pihak berkuasa yang sesuai untuk lesen sehingga ia menjadi pemilik berdaftar tanah yang dipersoalkan. Pemilik yang tidak berdaftar tiada hak untuk memohon untuk lesen yang diperlukan oleh perjanjian kayu balak tersebut. Dalam satu transaksi komersial seperti ini, pendekatan yang betul adalah untuk menafsirkan perjanjian tersebut sebagai suatu yang sejajar dengan akal perniagaan (lihat perenggan 8); *Prenn v Simmonds* [1971] 3 All ER 237 dirujuk; *Antaios Compania Naviera SA v Salen Rederierna AB* [1985] AC 191 diikut.

(3) Mahkamah Tinggi tersilap dengan menganggap dua perjanjian itu sebagai kontrak berasingan dan hanya meneliti tanggungjawab perayu di bawah perjanjian kayu balak tanpa mengendahkan perjanjian jualan tanah tersebut. Mahkamah Tinggi gagal untuk mengambil perhatian terhadap perintah tersebut di mana pihak-pihak perlu melaksanakan tanggungjawab masing-masing. Oleh itu terdapat merit dalam aduan yang diarahkan kepada penghakiman Mahkamah Tinggi oleh peguam bagi pihak perayu (lihat perenggan 9).

(4) Dalam kes semasa, responden jelas telah melanggar tanggungjawab utamanya untuk memindahkan tanah tersebut kepada perayu. Oleh itu, ia bukan dalam kedudukan untuk menggesa pelaksanaan tanggungjawab perayu di bawah perjanjian kayu balak untuk memohon lesen tersebut. Dalam kes semasa ia terangkum di bawah s 55 Akta Kontrak 1950 (lihat perenggan 10).

(5) Satu pelanggaran kontrak berkaitan tanah tersebut dianggap boleh dipatahkan tanpa remedi dengan pampasan wang. Dalam kes semasa, tiada keterangan untuk mematahkan andaian sedemikian sebagaimana yang terkandung dalam s 11(2) Akta Kontrak 1950. Justeru itu, pelaksanaan spesifik adalah remedi yang sesuai (lihat perenggan 11).

Per curiam:

Jika satu analisis semantik dan sintaksis terperinci perkataan-perkataan dalam satu kontrak komersial membawa kepada satu kesimpulan yang melanggar akal perniagaan, ia hendaklah memberi tempat untuk akal perniagaan (lihat perenggan 8).]

Notes

For a case on reciprocal promises, see 3(2) *Mallal's Digest* (4th Ed, 2003 Reissue) para 3244.

For cases on breach of contract generally, see 3(2) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 2264–2274.

For cases on construction generally, see 3(2) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 2719–2815.

Cases referred to

Antaios Compania Naviera SA v Salen Rederierna AB [1985] AC 191 (folld)
Idris bin Haji Mohamed v Ng Ah Siew [1935] MLJ 257 (refd)
Loo Choo Teng & Anor v Cheok Swee Lee & Ors and another appeal [2000] 2 MLJ 257 (refd)
Manks v Whiteley [1912] 1 Ch 735 (refd) (refd)
Mohamed Isa & Ors v Abdul Karim & Ors [1970] 2 MLJ 165 (refd)
Prenn v Simmonds [1971] 3 All ER 237 (refd)
Sekemas Sdn Bhd v Lian Seng Co Sdn Bhd [1989] 2 MLJ 155 (refd)
Zaibun Sa bte Syed Ahmad v Loh Koon Moy & Anor [1982] 2 MLJ 92 (refd)

Legislation referred to

Contract Act 1872 [India] s 52
Contracts Act 1950 ss 53, 55
Specific Relief Act 1950 s 11(2)

Gopal Sri Ram JCA (delivering judgment of the court):

[1] This is an uncomplicated case. Its facts have been set out and discussed at length in the judgment of the High Court reported at [1997] MLJU 337. For present purposes, a short summary suffices.

[2] The appellant and respondent entered into two contemporaneous agreements. One was for the transfer of land. The other was an agreement to fell and extract timber. It is the appellant's argument that both agreements should be read together. In support of her submission on the point, Cik Maidzuara relied on the following passage in the judgment of Raja Azlan Shah J (as he then was) in *Mohamed Isa & Ors v Abdul Karim & Ors* [1970] 2 MLJ 165 (at p 170):

> It is a settled rule of construction that where several documents forming part of one transaction are executed contemporaneously, all the documents must be read together as if they are one (see *Manks v Whiteley* [1912] 1 Ch 735. This principle was followed in *Idris bin Haji Mohamed v Ng Ah Siew* [1935] MLJ 257, where Terrell J at p 261 said:

> It is a well known rule of construction that where the arrangement between parties is contained in several documents all executed simultaneously, all the documents must be read together to ascertain the intention of the parties, and it is a corollary from this that the intention must be gathered from the documents as a whole. It has been held, for example, that when a bill of sale and a mortgage of a reversionary interest were executed simultaneously and related to the same debt, the bill of sale could be defeated by a condition contained only in the mortgage, *Edwards v Marcus* [1894] 1 QB 587 (see also the dissenting judgment of Fletcher Moulton LJ in *Manks v Whiteley*, which was approved on appeal to the House of Lords, sub-nominee *Whiteley v Delaney* [1914] AC 132).

[3] In the present case, the two said permits to mine referred to the same subject matter and were substantially in identical terms except that the second permit was to take effect only a year later, that is, after the first permit had expired. In the circumstances, the two permits to mine should be read together as forming one permit to mine for a period of two years.

[4] Under the second agreement, I will call it the 'timber agreement', the appellant was to apply for a timber licence. It did not do so. Neither did the respondent transfer the land under what I will call 'the sale of land agreement'. According to the appellant, it had carried out its obligations under that agreement and was therefore entitled to call upon the respondent to effect a transfer in its favour. The respondent says that it is for the appellant to apply for the licence in the first place. And, since it admittedly did not do that, there is nothing for the respondent to perform. So, this case has to do with the order in which the promises of the respective parties are to be performed. That it is the only issue in this case is common ground between the parties.

[5] Now, the order of performance of obligations in a contract is governed by s 53 of the Contracts Act 1950 which provides:

> 53. Where the order in which reciprocal promises are to be performed is expressly fixed by the contract, they shall be performed in that order; and, where the order is not expressly fixed by the contract, they shall be performed in that order which the nature of the transaction requires.

[6] The section is *ipsissima verba* s 52 of the Indian Contract Act 1872. In the leading textbook on the subject, viz, Singhal & Subrahmanyan's *Indian Contract Act* (4th Ed) p 984, the commentary to s 52 reads:

> Standing alone, however, the mere order of performances in time is not always decisive of the case. The promise to render the earlier performance is not conditional on tender of an agreed equivalent by the other party; but may be conditional on other factors even though it is not expressly so provided. For example, the promisor's duty to render the earlier performance is constructively conditional on the absence of a material increase in his risk of not getting the agreed exchange. He is privileged to withhold his performance, if the other party repudiates in advance, or if, for any reason, he becomes prospectively unable to render the agreed exchange, whether because of objective impossibility, or of insolvency, or other personal inability. So, if a seller promises to ship goods on a certain day, in return for the buyer's promise to pay for them after delivery, the seller's duty to ship is

A constructively conditional on the buyer's prospective ability to pay. If the seller can show that the buyer will not in fact be able to pay, he is privileged not to ship; this is true, in spite of the fact that shipment is to be first in time.

B **[7]** In the present instance, the two agreements when read together do not expressly fix the order of performance of the parties' respective obligations. Accordingly, the nature of the transaction must be looked at to determine this.

C **[8]** Taking the two agreements together and reading them as a whole and in the context of what Lord Wilberforce in his speech in *Prenn v Simmonds* [1971] 3 All ER 237 described as 'the objective aim of the transaction', it is clear that the appellant cannot possibly apply to the appropriate authority for the licence until it becomes the registered proprietor of the land in question. For, it is commonsense that a non-registered proprietor has no standing to apply for the kind of licence contemplated by the timber agreement. In my judgment, in a purely commercial transaction such as the one we have here, the correct approach is to interpret the D agreements in a way that is consonant with business common sense. As Lord Diplock said in *Antaios Compania Naviera SA v Salen Rederierna AB* [1985] AC 191at p 201:

> While deprecating the extension of the use of the expression 'purposive construction'; from the interpretation of statutes to the interpretation of private contracts, I agree with the passage I have cited from the arbitrators' award and I take this opportunity of restating that, E if a detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business common sense, it must be made to yield to business common sense.

F **[9]** Unfortunately, the High Court did not take this approach. It treated the two agreements as separate contracts and dealt only with the appellant's obligations under the timber agreement without having any regard to the sale of land agreement. Consequently, it failed to have any sufficient regard to the order in which the parties were to perform their respective obligations. In my judgment there is therefore merit in the complaints directed at the High Court's judgment by learned counsel for the G appellant.

[10] It follows that the respondent was clearly in breach of its primary obligation to transfer the land to the appellant. Therefore, it was not in a position to call for the performance of the appellant's obligation under the timber agreement to apply for the licence. The present case, in my judgment, falls plumb within s 55 of the H Contracts Act 1950. That section says:

> When a contract consists of reciprocal promises, such that one of them cannot be performed, or that its performance cannot be claimed till the other has been performed, and the promisor of the promise last mentioned fails to perform it, the promisor cannot claim the performance of the reciprocal promise, and must make compensation to the other I party to the contract for any loss which the other party may sustain by the nonperformance of the contract.

[11] Section 55 is, of course of general application when it speaks of the promisor having to pay compensation to the promisee. But, whether compensation is sufficient

in a given case depends on the subject matter of the contract. Here the subject matter is land. A breach of a contract relating to land is rebuttably presumed to be irremediable by monetary compensation (s 11(2) of the Specific Relief Act 1950). See also *Zaibun Sa bte Syed Ahmad v Loh Koon Moy & Anor* [1982] 2 MLJ 92. Having regard to the evidence before the High Court, I find no material going anywhere near to rebutting the presumption housed in s 11(2). Hence, the appropriate remedy in this case is specific performance.

[12] For the reasons already given, I would allow this appeal and decree specific performance of the sale of land agreement. The respondent must, within one month from today execute and hand to the appellant's solicitors a registrable memorandum of transfer in the appellant's favour together with the issue document of title to the land in question. In the event of the respondent's default in so doing, the senior assistant registrar of the High Court in Kuala Lumpur shall execute such transfer and the respondent shall within seven days of such default, deposit the issue document of title to the land with the senior assistant registrar. The appellant must bear the stamp duty, the registration fee and all costs attendant upon such transfer. The parties shall be generally at liberty to apply to the High Court for the purpose of carrying this order into effect. The respondent must pay the costs of this appeal and those incurred in the court below.

[13] One final point. During his submissions, learned counsel for the respondent faintly suggested that it may not be possible for his client to effect a transfer of the land to the appellant. That of course is wholly irrelevant at this stage. In the ordinary way, it must perforce be looked into on an application made in that behalf by the appellant to the High Court at the appropriate stage (see *Sekemas Sdn Bhd v Lian Seng Co Sdn Bhd* [1989] 2 MLJ 155; *Loo Choo Teng & Anor v Cheok Swee Lee & Ors and another appeal* [2000] 2 MLJ 257).

[14] My learned brothers, Mohd Ghazali and Arifin Jaka JJCA have seen this judgment in draft and have expressed their agreement with it.

Appellant's appeal allowed with costs.

Reported by John Paul Simon